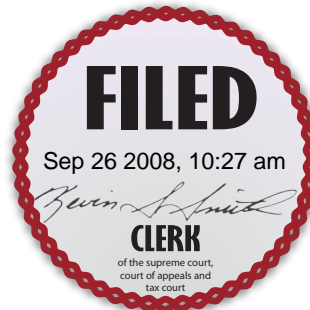


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

GORDON BROYLES and PHYLLIS BROYLES,)

Appellants-Defendants,)

vs.)

THE BOARD OF COMMISSIONERS OF)
HENRY COUNTY,)

Appellee-Plaintiff.)

No. 33A05-0806-CV-314

APPEAL FROM THE HENRY CIRCUIT COURT
The Honorable Matthew R. Cox, Special Judge
Cause No. 33C01-0208-MI-53

September 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellants-defendants Gordon Broyles and Phyllis Broyles appeal the trial court's award of \$45,007 in damages in an eminent domain action brought against them by appellee-plaintiff the Board of Commissioners of Henry County. Upon appeal, the Broyleses challenge the trial court's award by claiming that it did not constitute just compensation. We affirm.

FACTS AND PROCEDURAL HISTORY

As of 2002, the Broyleses owned a home and buildings on property totaling approximately 7.84 acres located at 721 East County Road 300 South in New Castle. Along with the Broyleses' residence, Gordon Broyles' plumbing business, which had five employees, was housed in a building on this property. The Broyleses' property was split into two parcels, the larger of which contained their residence and business building.

On August 21 and 23, 2002, the Board initiated condemnation actions¹ with respect to a total of approximately 1.044 acres of the Broyleses' property as part of an improvement project for County Road 300 South. The property which the Board sought to acquire consisted of a strip of land approximately 780.23 feet in length and 59.91 feet in width, which was ultimately used to widen County Road 300.² On January 24, 2003, court-appointed appraisers assessed the damages to the smaller parcel of the Broyleses' property to

¹ The Board initiated separate condemnation proceedings with respect to each parcel under Cause Numbers 33C01-0208-MI-53 and 33C01-0208-MI-57. In its complaint for condemnation of the smaller parcel under Cause Number 33C01-0208-MI-53, the Board named only Gordon Broyles, but Phyllis Broyles was subsequently joined as a party. On January 26, 2004, pursuant to a motion by the Broyleses, the trial court ordered that the actions be consolidated. Although the actions maintained separate cause numbers, the trial court's findings and conclusions indicate that the actions were considered as one joint action.

² In addition, the Board sought to condemn approximately .011 acre for a temporary right of way.

be \$1350. On February 13, 2003, the Broyleses filed an exception to this appraisal. On January 27, 2004, court-appointed appraisers assessed the damages to the larger parcel to be \$235,000. At this time, the actions were also consolidated. On March 19, 2004, the Board filed an exception to this assessment.

As a result of the taking, the Broyleses' residence's setback from County Road 300 was significantly reduced, from approximately fifty feet to ten feet, amounting to an eighty percent reduction in setback. In addition, the Broyleses lost portions of the gravel driveways leading to their home and business, three parking spaces at the business, as well as a portion of sidewalk and two trees. The Broyleses' home and the buildings on their property were not displaced as a result of the Board's actions.

The Broyleses hired David Deputy to perform an appraisal of their real estate for purposes of assessing their loss as a result of the Board's taking. On February 14, 2006, Deputy, under the supervision of Reily Burrell II, assessed the value of the taking as of October 23, 2002, at \$45,007. Additional appraisals performed by Daniel Semler and Larry Allison assessed this value at \$39,626 and \$43,700, respectively.³

The action was tried on July 18 and 20, 2006, as well as on November 19 and 20, 2007. At trial the Broyleses testified that, as a result of the taking, which both widened County Road 300 and routed it nearer to their house, traffic was significantly louder, and it

³ In an earlier review appraisal, Allison endorsed Brian Reske's appraisal valuing the property at \$38,150. In finding the "Allison-Reske" appraisal to be valued at \$40,150, the court presumably added Exhibit 11, Allison's reassessment of the smaller portion of the property, to the \$38,150 assessment in Plaintiff's Exhibit 10. Allison later conducted a second appraisal which valued the entirety of the taking at \$43,700. While the court endorsed Allison's appraisals, it ultimately relied upon Deputy's appraisal in arriving at a damages award.

caused their house to vibrate. Due to the proximity of the road, the Broyleses feared that a vehicle would leave the roadway and crash into their house. In addition, according to the Broyleses, their property and home were more subject to standing water and flooding. Accordingly, the Broyleses also sought compensation for the full value of their home, which Deputy valued at approximately \$90,075.

On January 12, 2008, the trial court entered findings of fact and conclusions thereon and awarded the Broyleses \$45,007 in damages. This appeal follows.

DISCUSSION AND DECISION

I. Damages Assessment

A. Standard of Review

In awarding the Broyleses damages, the trial court entered findings of fact and conclusions thereon. Where the trial court enters findings of fact and conclusions thereon pursuant to Indiana Trial Rule 52, we apply the following two-tiered standard of review: whether the evidence supports the findings and whether the findings support the judgment. *Tornatta Invs., LLC v. Indiana Dep't of Transp.*, 879 N.E.2d 660, 663 (Ind. Ct. App. 2008), *trans. denied*. The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.* We neither reweigh the evidence nor assess the credibility of witnesses, but consider only the evidence most favorable to the judgment. *Id.* We review conclusions of law *de novo*. *Id.* Moreover, it is generally held that upon review, an appellate

court will not disturb an award of damages in an eminent domain proceeding where the award is within the bounds of the probative evidence adduced at trial. *City of Carmel v. Leeper Elec. Servs., Inc.*, 805 N.E.2d 389, 393 (Ind. Ct. App. 2004), *trans. denied*.

B. Applicable Law

Indiana Code section 32-24-1-9 (2002) provides for damages appraisals in eminent domain actions on the following grounds:

- (1) The fair market value of each parcel of property sought to be acquired and the value of each separate estate or interest in the property.
- (2) The fair market value of all improvements pertaining to the property, if any, on the portion of the property to be acquired.
- (3) The damages, if any, to the residue of the property of the owner or owners caused by taking out the part sought to be acquired.
- (4) The other damages, if any, that will result to any persons from the construction of the improvements in the manner proposed by the plaintiff.

It is well established in Indiana that the basic measure of damages in eminent domain cases is the fair market value of the property at the time of the take. *State v. Church of Nazarene of Logansport*, 268 Ind. 523, 526, 377 N.E.2d 607, 608 (1978) (quotation omitted). It is mandated that the owner of property taken by the State must be justly compensated. *Id.* (citing Indiana State Constitution, Art. 1, § 21). In certain cases where the land taken is part of a larger tract, just compensation requires damages for the market value of the land taken as well as for damage resulting to the residue of the property. *See id.* at 526, 377 N.E.2d at 608-09. The justification for such severance damages arises out of the loss in value to the “remainder tract” by reason of a partial taking of land. *See id.* at 526, 377 N.E.2d at 609. (quotations omitted). Severance damages are predicated on the enhanced value of the “remainder tract” because of its relationship to the whole prior to the taking. *Id.* at 527, 377

N.E.2d at 609.

The proper measure of assessing severance damages in Indiana has been expressed as being the difference between the market value of the entire tract and the market value of the residue following the partial taking. *Id.* Notably, while certain items, such as intended future uses, are not separately compensable in eminent domain proceedings, information regarding these items is necessary to determine the diminution of market value of the residue as a result of the taking. *See id.*

C. Residence Value

The Broyleses argue that the trial court's award of damages in the amount of \$45,007 was inadequate because it failed to account for what they claim was the lost value of the residence, specifically \$90,075, as an alleged result of the taking. In making their argument, the Broyleses allege that the trial court denied compensation for any claim besides lost value on the ground that such claims were "not recognizable as eminent domain damages but as a separate claim against the County." Appellant's App. p. 151.

It appears that the trial court's conclusion on this point was directed at Gordon Broyles' specific request that a drainage tile be laid to correct drainage problems, which, as the trial court determined, likely would not be included in a proper damages assessment. *See State v. City of Terre Haute*, 250 Ind. 613, 622-23, 238 N.E.2d 459, 465 (1968) (concluding that future costs such as required extension of water main, although attributable to condemnation proceedings, were not compensable).

In any event, the Broyleses fail to demonstrate clear error in the court's alleged denial

of the full value of damages due. In order to recover damages suffered as a result of an improvement, the property owner *must* have those damages assessed in the condemnation case. *City of Hammond, v. Marina Entm't Complex, Inc.*, 733 N.E.2d 958, 964-65 (Ind. Ct. App. 2000), *trans. denied* (emphasis in original). Here, the Broyleses claim the trial court failed to award damages on multiple grounds, including construction damages under Indiana Code subsection 32-24-1-9(4), yet their only claimed measure of those damages is the value of their house. Even assuming that all of the Broyleses' claimed damages directly correspond to their house's value, there is little support in the record suggesting that their house was a total loss. The trial court placed little if any weight on lay witness Ruel Chilton's testimony suggesting as much, and none of the expert appraisals, including the Deputy/Burrell appraisal upon which the Broyleses rely in claiming damages for their home in the amount of \$90,075, determined that the house was a total loss.

Additionally, the Broyleses fail to demonstrate that the additional damages they seek were not already factored into the expert appraisers' assessment of damages. As expert appraiser Semler testified, those factors which the Broyleses claimed constituted additional damages were already integrated into the statistics used to assess the reduced value of the property. While admittedly, the Deputy/Burrell appraisal upon which the court assessed damages stated that it did not include drainage damages, the trial court's findings suggest that drainage problems, which were present prior to the taking, were not necessarily attributable to the Board's actions. Indeed, the Broyleses' own witness, Richard Byers, testified that drainage would improve as a result of the taking and resulting road improvement. In any

event, neither of the other expert appraisals, including Semler's, both of which resulted in a lower damages assessment, contained a similar provision excluding drainage damages. Given the record and the Broyleses' burden of proof, we find no clear error in the trial court's failure to award damages for the full value of their home.

D. Land Value

The Broyleses additionally challenge the trial court's award of damages by claiming that the value of the taking was inaccurately calculated because it did not properly assess the setback or account for a ten-foot strip of land which the Broyleses allege was erroneously deemed to be a right-of-way. We conclude that the Broyleses' claims on these points are merely invitations to reweigh the evidence, which we decline to do.

Although the exact dimensions of the setback presented a factual issue at trial, the record demonstrates that the Broyleses did not dispute Deputy's assessment both at trial and in his appraisal that the setback was approximately ten feet. The trial court was within its discretion to find this assessment credible and Deputy's resulting appraisal based upon that assessment reliable. Accordingly, we reject the Broyleses' challenge to the appraisal based upon their factual claim that the setback was inaccurately calculated.

In addition, although the Broyleses claim that there was inadequate accounting for a strip of land which they allege was erroneously construed by the Board and the appraisers to be a right-of-way, the record does not support a finding of clear error on this point. To the extent that the Broyleses claim that certain property was inaccurately categorized as "right of way," we observe that the Broyleses did not challenge Deputy's appraisal on these grounds at

trial, and the trial court was within its discretion to find Deputy's appraisal credible. In any event, expert appraiser Semler, whose appraisal of \$39,626 was also endorsed by the trial court, testified that he gave the Broyleses full value for that part of their property which constituted a right-of-way, "as if the County had no right of way." Tr. p. 218.

To the extent that the Broyleses claim they were not compensated for the property constituting the right-of-way, the record similarly does not support their contention. In describing the property⁴ to be acquired, Deputy's appraisal categorized the property as follows:

The proposed permanent right-of-way (Parcel 15) is an irregular-shaped strip acquisition from the northern boundary of the subject's larger parcel. The taking is from both the allocated, improved home site as well as the excess commercial/industrial land. Overall, the taking measures 780.23' along the larger parcel's East County Road 300 South frontage. It is 59.9' in width along the larger parcel's western border and remains this width along the majority of the subject's frontage.... According to the legal description provided, it contains a total land area of 1.044± gross acres. By scaling from a plat map of the larger parcel, it is estimated that 0.404± gross acre of the taking is from the allocated, improved home site while 0.640± gross acre is from the subject's excess commercial/industrial land. *Of the 0.404± acre taking from the improved home site, 0.287± acre is estimated as new right-of-way while 0.117± acre is estimated as existing right-of-way. By scaling from plan sheets provided, this existing right-of-way is further broken down to include 0.072± acre under pavement and 0.045± acre that is not under pavement. Of the 6.40± acre taking from the excess commercial/industrial land, 0.464± acre is estimated as new right-of-way while 0.176± acre is estimated as existing right-of-way. By scaling from plan sheets provided, this existing right-of-way is further broken down to include 0.107± acre under pavement and 0.069± acre that is not under pavement. Per INDOT guidelines, all existing right-of-way under pavement is valued at \$1.00. The remaining existing right-of-way not under pavement is valued at 5% of the adjoining fee value.*

⁴ Deputy's appraisal evaluates the Broyleses' property by designating its two parcels "home site" and "excess commercial/industrial land." Plaintiff's Exh. 8, p. 20.

Plaintiff's Exh. 8, p. 20 (emphasis supplied).

With respect to the home site, Deputy's appraisal then assessed the value for the 0.045 acre of unpaved right-of-way to be \$24.00, and the 0.072 acre of paved right-of-way to be \$1.00. With respect to the excess land, Deputy's appraisal assessed the value for the 0.069 acre of unpaved right-of-way to be \$26.00 and the 0.107 acre of paved right-of-way to be \$1.00. As demonstrated by Deputy's appraisal, and contrary to the Broyleses' claim, the trial court's assessment of damages did account for land deemed to be a right-of-way, the relevant portion of which was assessed at \$50.00.⁵ We find no clear error on this point.

II. Interest

The Broyleses additionally claim that the trial court erred in failing to award interest pursuant to Indiana Code section 32-24-1-11(d)(6) (2002). Because this issue was not presented to the trial court in the proceedings below, we deem it waived and decline to consider it for the first time on appeal. The record demonstrates that the question of interest was not argued at trial and that the trial court made no findings or conclusions on this issue. Indeed, apart from a single reference to a proposition of law regarding interest awards, the Broyleses proposed no findings or conclusions relating to this topic, nor did they suggest or include an award of interest in their proposed judgment. The Broyleses' claim on this issue is therefore waived. *See Poulard v. Lauth*, 793 N.E.2d 1120, 1123 (Ind. Ct. App. 2003).

III. Conclusion

Having concluded that the Broyleses' challenges to the trial court's award of damages

⁵ The Broyleses do not appear to claim error with respect to the paved right-of-way.

are without merit, and having determined that their claim for interest is waived, we affirm the trial court's award in the amount of \$45,007.

The judgment of the trial court is affirmed.

RILEY, J., and BAILEY, J., concur.